IN THE

# Supreme Court of the United States

**October Term, 1962**

**No. 57**

MICHAEL CLEARY,

*Petitioner,*

—against—

EDWARD BOLGER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION, *AMICUS CURIAE*

NEW YORK DISTRICT ATTORNEYS ASSOCIATION
*Amicus Curiae*

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Dated: August, 1962.

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### AUTHORITIES CITED

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### Jurisdiction, Opinions Below and Statutes Involved

The facts of jurisdiction, the citations of the opinions below and the statutes involved are set forth in petitioner's brief herein (pet's. br., pp. 1-3).

### Questions Presented So Far As the *Amicus Curiae* Is Concerned

1. Whether respect for the proper balance between the federal government and the several states interdicts a federal court from determining in advance that a state court or agency would erroneously decide a claim of deprivation of du process and therefore enjoining a state agency in advance from considering the matter claimed to violate due process?

2. Whether a federal court can effectively intervene in state proceedings and impose upon a state court or agency a federal law or rule of procedure or evidence which does not involve due process, as, for instance, Rule 5(a) of the Federal Rules of Criminal Procedure, by enjoining a state officer from presenting in such state proceeding evidence which he obtained independently by being a witness thereto—not which was handed to him by federal officers—during the violation of federal law by federal officers?

## The Operative Facts

The opinion of the District Court (189 F. Supp. 237) contains a detailed statement of the operative facts involved, and those facts are adopted as established for the purpose of arguing the question presented. Succinctly, they are as follows:

At about 9:00 a.m. of September 12, 1959, two federal customs officers, Patterson and Conlon, took respondent into custody near a pier in New York City, after having had respondent under observation for about an hour (R. 9-10). Upon being questioned later by Patterson and Conlon, respondent admitted that he had contraband in his home in New Jersey (R. 11). At 11 a.m., Patterson, Conlon and another federal officer proceeded from New York City to respondent's home in New Jersey, where a search was conducted and contraband seized (R. 12). Parenthetically, neither petitioner nor any other state officer was present at, and did not participate in, these actions.

The federal officers and respondent returned to Customs Headquarters in New York, arriving there about

4:00 p.m. (R. 12). Ten minutes later, respondent was questioned briefly by Machry, a detective of the Waterfront Commission of New York Harbor, a bi-state agency of the States of New York and New Jersey, and was asked to show his hiring agent's and longshoreman's licenses* (R. 9, 13). A federal officer and petitioner were standing nearby (R. 13). They questioned respondent relative to a key, and the three left headquarters to investigate the matter of the key (R. 13). Finding nothing of consequence, they returned to Customs Headquarters at about 5:45 p.m. (R. 13). A few minutes later, respondent was questioned by two federal officers, which was recorded by a Customs Service reporter (R. 13). Petitioner was present during this questioning but he did not participate in it (R. 13).

A month later, respondent was arrested by New York police and charged with larceny for the theft of part of the contraband which had been found in his home, on which charge a state criminal prosecution was instituted (R. 14). As a result of this, the Waterfront Commission suspended temporarily respondent's licenses as a hiring agent and longshoreman, and set down for hearings the question of the revocation of these licenses, which hearings were deferred until the disposition of the larceny charge (R. 14).

During the pendency of the trial for larceny and the Waterfront Commission hearing, respondent brought an action in the United States District Court for the South-

* Machry was not made a party in the action to enjoin the use of the statements made by respondent claimed to have been unlawfully obtained and therefore inadmissible in evidence. Though it is not specifically so stated, it is therefore assumed that nothing incriminating was produced in this brief questioning.

ern District of New York for injunctions to restrain the federal officers involved and petitioner from testifying in the state court in the trial for larceny or in the proceedings before the Waterfront Commission for the revocation of his licenses as to any evidence obtained by the search and seizure or statements made during his detention (R. 1-5, 8-9).

The District Court found on the facts that the search of respondent's home and the seizure of contraband there, having been made without a warrant, were in violation of the Fourth Amendment of the United States Constitution (R. 27-28) and that the statements made by respondent after 11 a.m., by which time he could have been brought before a commissioner, were made during an unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure (R. 26). Thereupon judgment was granted to respondent (1) enjoining and restraining the federal officers from giving testimony in the state criminal proceedings as to evidence obtained during the illegal search and seizure or as to statements made by respondent during the illegal detention (R. 35) and (2) enjoining the federal officers and petitioner from giving any testimony or producing any evidence in the state criminal proceedings or any trial or hearing before the Waterfront Commission as to statements made by respondent during his unlawful detention (R. 36).

## POINT ONE

**A proper balance between the federal government and the states interdicts intervention by federal courts into state proceedings by prior restraint of state officers or state courts or agencies.**

As to the remedy available to respondent against the federal officers for the product of the unlawful search and seizure in violation of the Fourth Amendment and the statements made during the unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, the District Court encountered no difficulty in concluding that it had power to deal with such violations. The court found that because of such transgressions it was "required in the exercise of the supervisory powers of [that] court over federal law enforcement officers, to enforce obedience to the Rules of Criminal Procedure by enjoining the [federal] agents" from testifying in any state criminal or administrative proceeding in respect of the evidence obtained by the illegal search and seizure or the statements made by respondent during his unlawful detention or from turning over such evidence or statements to state officers (R. 30).

But the District Court also found that "[t]he question of whether relief should be granted against [petitioner] is a difficult one." Nevertheless the court also enjoined petitioner from testifying in any state proceedings as to any statements he heard respondent make to federal officers while unlawfully detained by the latter. The rationale for this action by the court, in which the Court of Appeals expressly concurred, was, as hereinafter set forth, a fallacious distinction between *Stefanelli* v. *Minard* (342 U. S.

117) and *Rea* v. *United States* (350 U. S. 214) and a tortuous and erroneous extension of the holding in *Rea*.

In no case has this court ever sanctioned the intervention by a federal court in a state criminal or administrative proceeding by restraining the tribunal itself from receiving or a state officer from presenting evidence which is inadmissible because of the United States Constitution or federal law. It is true that this proposition in that precise framework, or in the framework of the fact situation here presented, has never been presented to this court. However, from the holdings of this court in similar situations, the principle is clear that such intervention is interdicted. Further, in the one case where a federal court dealt with evidence to be used in a state criminal proceedings and claimed to have been obtained unconstitutionally, such action was not directed towards the state officers or state court, or towards the evidence itself, but solely towards federal officers as such. (*Rea* v. *United States*, 350 U. S. 214.)

In *Stefanelli* v. *Minard* (342 U. S. 117) equitable relief was sought from a federal court to prevent the fruits of an unlawful search and seizure by state police from being used in evidence in a state criminal trial. In that case, this court, by Mr. Justice Frankfurter, said (pp. 120-121):

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in

issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, e.g., 28 USC §§ 1341, 1342, 2283, 2284(5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a State's enforcement of its criminal law. (Citing cases.) It has received striking confirmation even where an important countervailing federal interest was involved. Maryland v. Soper (No. 1), 270 US 9; Maryland v. Soper (No. 2), 270 US 36; Maryland v. Soper (No. 3), 270 US 44.

"These considerations have informed our construction of the Civil Rights Act. This Act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning. Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the states and the federal government in law enforcement.' Screws v. United States, 325 US 91, 108. * * *."

Then, further demonstrating the desirability of maintaining this separateness of jurisdiction between the federal government and the states, Mr. Justice Frankfurter stated (pp. 123-124):

"The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to

> sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

It is true that only state officers and no federal officers were involved in *Stefanelli*. But that does not make the principle there enunciated and the rationale on which it is based less applicable because federal officers may also be involved. In *Wilson* v. *Schnettler* (365 U. S. 381) this court held that a complaint in equity in a federal court to enjoin federal narcotic agents from testifying in a state criminal proceeding on the ground that they had been guilty of an unlawful search and seizure had been properly dismissed. This court, by Mr. Justice Whittaker, said (p. 385):

> "There is still another cardinal reason* why it was proper for the District Court to dismiss the com-

* The Court of Appeals below discounted this ground for this court's holding in *Wilson* and held that this ground did not govern or control because the "basic reason for the court's failure to follow *Rea*" was the failure of the complaint in *Wilson*

plaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' Ponzi v. Fessenden, 258 U S 254, 259. Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is both clear and imminent: . . .' Douglas v. Jeannette, supra (319 U S at 163)."

The District Court recognized that " • • • the *Stefanelli* case would preclude injunctive relief against [petitioner], in his capacity as a state law enforcement officer • • • " (R. 31). But by a misconstruction of the distinction made in *Rea* between that case and *Stefanelli* and by an unwarranted and erroneous enlargement of the holding in *Rea*, with which the court below agreed, it was held that *Stefanelli* did not apply to petitioner, albeit a state officer, and he,

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to allege the illegality of the seizure and that the decision in *Wilson* "ultimately rested on the insufficiency of the allegations of the complaint" (R. 42). That the court below misconstrued the basis of decision in *Wilson* is manifest. Labelling the second ground of decision in *Wilson* as "another *cardinal* reason" for the court's determination is emphatic and cogent proof that this basis was considered by the court to be of equal weight and value as the question of insufficiency of the complaint.

too, was enjoined from presenting evidence in the state criminal trial and in the state proceeding. The rationale for this conclusion was, in essence, that since petitioner was a witness to the unlawful detention by the federal agents when respondent made the statements heard by petitioner, he was also infected with that transgression and, though not a federal agent, he was also subject to the supervision and control of the court as is a federal agent. That this was a fiction which violated the basic concepts of the power of a federal court to deal with claims such as here presented is clear.

In *Rea* v. *United States* (*supra*), the petitioner was indicted in a federal court for the unlawful possession of marijuana. The court, on petitioner's application, made an order pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure suppressing the evidence on the ground that it had been illegally obtained. Later, on the government's motion, the indictment was dismissed. Thereupon a federal narcotics agent swore to a complaint in a state court, and petitioner was then charged with possession of the same marijuana which the federal court had suppressed as evidence. The entire case against petitioner in the state court would have been made by the testimony of the federal agent based on the illegal search and on the illegally seized evidence. In enjoining the federal agent from testifying in the state case, the court did not do so on the basis of any power to intervene in state proceedings. The court said (pp. 216-217):

> "We put all the constitutional questions to one side. We have here no problem concerning the interplay of the Fourth and the Fourteenth Amendments nor the use which New Mexico might make of the evidence.

The District Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law. Cf. Boske v. Comingore, 177 U S 459. The only relief asked is against a federal agent, who obtained the property as a result of the abuse of process issued by a United States Commissioner. The property seized is contraband which Congress has made 'subject only to the orders and decrees of the courts of the United States having jurisdiction thereof,' as provided in 28 U S C 2463, already quoted. In this posture we have then a case that raises not a constitutional question but *one concerning our supervisory powers over federal law enforcement agencies.* Cf. McNabb v. United States, 318 U S 332.

"A federal agent has violated the federal Rules governing searches and seizures. Rules prescribed by this Court and made effective after submission to the Congress. See 327 U S 821, et seq. The power of the federal courts extends to policing those requirements and making certain that they are observed. As stated in Wise v. Henkel, 220 U S 556, 558, which involved an order directing the district attorney to return certain books and papers unlawfully seized:

"'. . . it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged reasonable exertion of authority in connection with the execution of the process of the court.'

"*No injunction is sought against a state official. The only remedy asked is against a federal agent who, we are told, plans to use his illegal search and seizure*

> *as the basis of testimony in the state court.* To enjoin the federal agent from testifying *is merely to enforce the federal Rules against those owing obedience to them.*
>
> "The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. * * *." (Emphasis supplied.)

Nevertheless, the District Court erroneously construed this holding as follows (R. 32):

> "If no injunction can be issued against [petitioner] he is in a position to testify in the state court proceedings as to [respondent's] admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the *Rea* case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of [petitioner]."

The *Rea* case, however, did not pronounce a general policy by the federal courts "of protecting the privacy of the citizen against invasion in violation of the federal rules." If it did, then it overruled *Stefanelli* and the cases dealing with state violations of non-constitutional federal rights of privacy, such as *Pugach* v. *Dollinger* (365 U. S. 458), and *Schwartz* v. *Texas* (344 U. S. 199, 201-202), which refused to enjoin in a state court the divulgence of intercepted tele-

phone conversations in violation of section 605 of the Federal Communications Act, held by this court to be inadmissible in evidence in a federal prosecution (*Nardone* v. *United States*, 302 U. S. 379, 382; 308 U. S. 338, 339), or such as *Stein* v. *New York* (346 U. S. 156, 187-188) and *Gallegos* v. *Nebraska* (342 U. S. 55, 64), in which this court held that the rule of federal courts that statements made during unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure are not admissible in evidence (*Mallory* v. *United States*, 354 U. S. 449, 455; *McNabb* v. *United States*, 318 U. S. 332, 344-345) is not binding upon the states. But it is clear that *Rea* was not intended to and did not overrule the principle announced in those cases by this court. What *Rea* held, and which the District Court apparently misconstrued or overlooked, was that the injunctive relief which was there granted derived from that court's "supervisory powers over federal law enforcement agencies" (p. 217) and because the evidence had previously been, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, suppressed in a pending proceeding in that court and rendered "not admissible in evidence at any hearing or trial." These principles—which do not apply to the instant matter—were recognized in *Wilson* v. *Schnettler* (*supra*) as the rationale of the holding in *Rea*, as follows (pp. 625-626):

> "Notwithstanding all of this, petitioner contends that the averments of his complaint were sufficient to entitle him to the relief prayed under the principles announced in Rea v. United States, 350 U S 214. But it is plain that the averments of this complaint do not invoke or even approach the principles of the Rea Case. That case did not hold, as petitioner's

contention assumes, that narcotic drugs lawfully seized by federal officers are inadmissible, or that such officers may not testify about their seizure, in state prosecutions. Such a concept would run counter to the express command of Congress that federal officers shall cooperate with the States in such investigations and prosecutions. See 21 U S C §198(a). Indeed, the situation here is just the reverse of the situation in Rea. There, the accused had been indicted *in a federal court* for the unlawful acquisition of marihuana, and had moved in that court, under Rule 41(e) of the Federal Rules of Criminal Procedure (18 U S C Rule 41(e)), for an order suppressing the use of the marihuana as evidence at the trial. After hearing, the District Court, finding that the accused's arrest and search had been made by federal officers under an illegal warrant issued by a United States Commissioner, granted the motion to suppress. The effect of that order, under the express provisions of that Rule, was that the suppressed property 'shall not be admissible in evidence at any hearing or trial.' Cf. Reina v. United States, 364 U S —; 5 L ed 2d 249. 81 S. Ct. 260, 262, 263. Despite that order, one of the arresting federal officers thereafter caused the accused to be re-arrested and charged, in a state court, with possession of the same marihuana in violation of the State's statute, and threatened to make the State's case by his testimony and the use of the marihuana that the federal court had earlier suppressed under Rule 41(e). Thereupon, to prevent the thwarting of the federal suppression order, petitioner moved the federal court to enjoin that conduct. That court denied the motion and its judgment was affirmed on appeal. On certiorari, this Court, acting under its supervisory power over the federal rules, 'which extends to policing (their) requirements and making certain

> that they are observed,' 350 U S, at 217, reversed the judgment, because 'A federal agent (had) violated (and was about further to violate) the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U S 821, et seq.' 350 U S, at 217.
>
> "How different are the facts in the present case! Here there is no allegation or showing that any proceedings ever were taken against petitioner under any federal rule or in any federal court.' * * *."

From the foregoing it also follows that the extension by both courts below of the principle in *Rea* to give a federal court power to enjoin those who are not in fact federal officers but who are witnesses to the acts of federal officers is fallacious indeed. The District Court held that petitioner should be enjoined "not in his capacity as a state official but because he participated as a witness in the unlawful acts of the federal officers on behalf of the United States"; that "[s]uch participants are properly within the orbit of the power of the federal courts to enforce rules against federal agents owing obedience to them" (R. 33). The Court of Appeals agreed that petitioner was "not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents" (R. 41), as to which witnesses a federal court has the same power of injunction as it has against a federal agent.

But the fact is to the contrary. It is utterly unrealistic to categorize petitioner as a witness and not a state official. It is indisputable that petitioner was in Customs Headquarters as an official of the Waterfront Commission; that what he saw and heard was not as a casual witness but as

a Waterfront Commission officer; and that he would testify in the state proceedings, particularly the administrative proceedings before the Waterfront Commission, as an official of that body. By no theory did petitioner, by the mere fact of being a witness, while present as a Waterfront official, to an interrogation by federal agents during an illegal detention, become a "federal law enforcement agent." Moreover, the supervisory powers exercised by the federal court in *Rea* was not to vindicate the failure to comply with a federal Rule; it was exercised rather, as pointed out in *Wilson*, upon a federal agent to enforce, and to prevent violation of, a prior order of that court.

The further rationale given by the courts below for their holding—that the power of the federal court to enjoin the use of evidence obtained in violation of federal law must be extended to non-federal officers to prevent a frustration of that power—is equally untenable. The power in the court to act in a state proceeding is derived not from the violation of federal law but rather from its supervisory control over federal officers. This power and jurisdiction of supervisory control may not be extended to other than federal agents solely because not so to extend them would prevent the federal court from exercising jurisdiction in a state proceeding over matter which violates federal law. To permit such extension of power would be an unwarranted assumption of control over those who are not subject to the jurisdiction of the court and, in a case such as this, an unwarranted invasion of the rights and powers of the states.

Three other aspects of the matter remain to be considered. Firstly is the proposition that the prior restraint here imposed upon a state official is bottomed upon the

postulate that the courts and administrative agencies of New York State would act erroneously in violation of respondent's constitutional rights and in violation of non-constitutional federal law. That this is in direct violation of the principle of proper balance between the federal government and the states is manifest. This is precisely the development which Mr. Justice Frankfurter warned against in *Stefanelli* (*supra*, pp. 7-8).

Secondly, the principle in the opinions in the courts below in this case creates a situation that wherever federal and state officers may be acting on the same case as to one individual, the one for violation of federal law and the other for violation of state law, the federal rules of procedure, whether as to a constitutional right or not, will supersede and bind the state courts. This would be an unwarranted usurpation by the federal government of rights retained by the states. As was eloquently said by Judge Anderson in his dissent below (R. 46-7):

> "To attempt to base a rule on the degree or weight of the state agent's participation in a joint enforcement endeavor is wholly impractical. Either the law should be that the use in the state courts of all evidence obtained by state agents, illegally under federal rules or statutes, shall be enjoined by the district courts where, in procuring that evidence, the state agents have been assisted in whole or in part by federal agents; or the law should be that the admissibility of such evidence in the state courts shall be left wholly in the power of the state courts. The majority decision which leans toward the former principle means that in every case where there has been any degree of 'commendable cooperation' between federal and state enforcement officers, and

there are involved federal constitutional rights which the states must recognize, the states are also bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so. To require the states to follow and apply congressional enactments and the rules of the federal courts in this fashion would constitute a long step toward the destruction of the division of powers. It is directly contrary to *Pugach* v. *Dollinger*, 365 U. S. 458 (1961).

Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the [fol. 56] 'insupportable disruption' which would result., *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951)."

Thirdly, and not least, is the implicit but strong imposition upon the states of federal non-constitutional Rules and statutes where federal and state agents are involved in a matter because federal as well as state laws may have been violated. It is true that the District Court did—in a rather oblique fashion—condemn respondent's statements as the fruit of the illegal search and seizure (R. 29), which is the infringement of a constitutional right. It is clear, however, that this was a subordinate and secondary consideration, and that the basic rationale for holding the

statement inadmissible was the fact that it was made during an unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. The court said (R. 29):

> "It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Procedure by the agents and of the illegal search and seizure • • •. The same applies to any other incriminating statements made by him after he left with the agents for New Jersey when his unlawful detention began. See *Mallory* v. *United States*, *supra*; *McNabb* v. *United States*, *supra*."

This, as is so forcefully delineated in the above quotation from the dissent of Judge Anderson, would result in constituting federal law and rules not in a constitutional area binding upon the states.

## CONCLUSION

**To preserve the proper balance between the federal government and the states, the assumption of supervision by the federal court over petitioner and the concomitant effective intervention into state proceedings cannot stand.**

Respectfully submitted,

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